University of Richmond
UR Scholarship Repository

Bookshelf

2011

The Religion Clauses of the First Ammendment: Guarantees of States' Rights?

Ellis M. West
University of Richmond, ewest@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/bookshelf

 Part of the Political Science Commons

Recommended Citation
West, Ellis M. *The Religious Clauses of the First Amendment: Guarantees of States" Rights?* Lanham, MD: Lexington Books, 2011.

NOTE: This PDF preview of The Religion Clauses of the First Ammendment: Guarantees of States' Rights? includes only the preface and/or introduction. To purchase the full text, please click here.

This Book is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in Bookshelf by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

The Religion Clauses of the First Amendment

Guarantees of States' Rights?

Ellis M. West

LEXINGTON BOOKS
A division of
ROWMAN & LITTLEFIELD PUBLISHERS, INC.
Lanham • Boulder • New York • Toronto • Plymouth, UK

Chapter One

Introduction

In America, religious freedom has often been referred to as the "first freedom,"[1] but for different reasons. Some believe it to be the most important or valuable of freedoms, and usually on the grounds that religion itself is the most important aspect of human life. After all, religion has traditionally been understood as a person or group's relationship with some kind of transcendent or supernatural power and source of meaning, and those who believe in the existence of such a reality would be very likely to consider their relationship with it to be their most important relationship. James Madison, for example, in making the case for religious freedom, wrote, "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society."[2]

For others religious freedom is chronologically the "first freedom;" it was the first freedom in the course of Western civilization to be understood as a fundamental and universal natural or human right. As such, it opened the way for other freedoms, such as freedom of expression, to be identified as fundamental, universal "rights of man."[3] Being first in this sense does not imply that religious freedom is first in rank or value, but only that efforts to establish it preceded and led to the widespread belief in the idea of natural rights in general. Some persons, however, go further and argue that religious freedom is logically, as well as historically, prior to other freedoms; their establishment depends on its establishment.[4]

A third reason that religious freedom is often called the "first freedom" is because it is the first freedom to be mentioned and guaranteed in the Bill of Rights section (first ten amendments) of the United States Constitution. The First Amendment begins with these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there-

of. . . ."[5] These words are generally referred to as the religion clauses of the First Amendment. Moreover, during the course of American history most Americans have interpreted this language as protecting a very important natural or human right, i.e., the freedom of individuals, as Madison said, to render such homage to the ultimate source or ground of human existence as they believe is required of them.[6] This is certainly the way the Supreme Court of the United States has interpreted the religion clauses.[7]

In recent years, however, several constitutional law scholars have challenged this traditional interpretation of the religion clauses of the First Amendment. They argue that the rights protected by those clauses are those of states, not individuals. They contend that the clauses have no *substantive* meaning, i.e., have nothing to say about what the relationship between government and religion or government and individuals should be. Instead, the clauses are purely *jurisdictional* in nature, i.e., are simply statements that only the states, and not the national government, have the authority to determine what the relationship between government and religion should be. According to this interpretation, the religion clauses were not intended to and do not guarantee a basic, universal, natural right or express a normative principle of any sort.

This interpretation of the religion clauses has been most forcefully and influentially expressed by Steven Smith, a law professor and leading scholar in the area of religion and government, in the book, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom.*[8] He writes therein that "the religion clauses have nothing of substance to say on questions of religious freedom. The original meaning supplies us neither with concrete answers to particular legal questions nor with any general principle, norm, value, or theory that might serve as a basis for working out such answers." Smith explains that the clauses do not address such questions as "Should government establish one religion as the official state religion? Should the state subsidize a religion? Should it support all religions . . . on equal terms?" He concludes, "If we ask, therefore, what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is 'None.'" Instead, the religion clauses, he says, are a declaration of states' rights, not individual rights. As such, they were intended to protect from federal legislation both the anti-establishment of religion policies of states like Virginia and the pro-establishment policies that still existed in some New England states.[9]

What is notable about Smith's states' rights or jurisdictional interpretation is that it applies to the free exercise clause as well as the establishment clause. Although some scholars have over the years argued that the sole purpose of the establishment clause was to protect states' rights, they have usually conceded that the free exercise clause has substantive meaning, i.e., was meant to prevent the federal government from passing laws that would

violate the citizens' religious freedom.[10] Others have posited an even narrower interpretation of the establishment clause, namely, that it was intended to protect from Congressional legislation not states' rights as such, but state establishments of religion, but they too have thought that the free exercise clause has normative meaning, i.e., was meant to protect the religious freedom of individuals. This, for example, is the position of Supreme Court Justice, Clarence Thomas, who contends that the establishment clause, unlike the free exercise clause, "does not protect any individual right," but "is a federalism provision intended to prevent Congress from interfering with state establishments [of religion]," and for this reason should not be used by the courts to strike down state laws on religion. Such laws can be struck down only if they are coercive and thus violate the free exercise clause.[11] This idea that the free exercise clause has normative meaning, i.e., protects religious freedom, whereas the establishment clause does not, but protects only states' rights or state religious establishments, Smith labels the dualistic view of the religion clauses.

Other scholars have taken a more complicated position. They have said that the free exercise clause has entirely substantive meaning and that the establishment clause has both substantive and federalist content, i.e., it was intended to prevent the federal government from both establishing (at the national level) and disestablishing (at the state level) a church or religion.[12] This also appears to be the position of Supreme Court Justice, Antonin Scalia.[13]

In contrast, Smith argues that the free exercise clause, as well as the establishment clause, is simply a declaration that the federal government has no jurisdiction over the subject of religion. He writes:

> . . . [T]his dualistic view of the religion clauses, although virtually ubiquitous, is nonetheless mistaken. The religion clauses were not a hybrid creation—part federalism, part substantive right. They were, rather, simply an assignment of jurisdiction over matters of religion to the states—no more, no less. Consequently, perverse though it seems, the religion clauses simply do not speak to the substantive questions of religious freedom.[14]

According to Smith, the main reason that the religion clauses are purely jurisdictional in nature is the fact that early Americans were so divided in their thinking on the proper relationship between government and religion that they could not possibly have agreed on a substantive principle to encase in the clauses. He writes, "The founders *did not* answer the religion question because they *could not* have done so."[15]

Smith, however, is not the first scholar to so interpret the religion clauses. In 1964, Wilber G. Katz, a distinguished professor of law at the University of Chicago, suggested that the clauses "embodied a principle of federalism" that precluded the federal government from legislating on religion because such a

power was reserved to the states. This meant, however, that the clauses did not prohibit it from legislating on religion "in areas beyond the authority of any state; for example, in the armed forces, the District of Columbia, and the territories." On the other hand, Katz speculated that the free exercise clause might have been meant to protect religious freedom from federal laws applicable *to those areas.* In all other areas, he said that the religion clauses protect only states' rights. [16](Although familiar with Katz's interpretation, Smith, for some reason, fails in his book to acknowledge it.)

Since its publication in 1995, Smith's interpretation of the religion clauses has been accepted by several other scholars. For example, Jay S. Bybee, a former law professor and now federal circuit court judge, writes:

> The Founders had their substantive views of church and state, of course, but they did not codify their views in the Bill of Rights. Thus, no coherent theory of the religious liberty or freedom of expression can be drawn from the text or the history of the First Amendment; such questions were deliberately deferred to the states. The First Amendment was the least common denominator; it was simply jurisdictional. [17]

Bybee states explicitly that the clauses neither "address church-state relations" nor guarantee "personal rights."[18] Professor of law, Daniel O. Conkle, appears to agree.[19] Kurt T. Lash, another law professor, not only agrees with, but goes beyond Smith, for he argues that the entire First Amendment was "hyper-Federalist," i.e., intended to protect "state autonomy to regulate matters like religion, speech, and press."[20]

Other scholars have accepted most, but not quite all, of Smith's thesis. Reluctant to concede that the religion clauses have *no* substantive content, they argue that they are "primarily" or "mainly" jurisdictional in meaning. Both clauses, in short, were intended primarily, if not entirely, to protect states' rights or the principle of federalism and not individuals' rights.[21] For example, Daniel Dreisbach, a leading church-state scholar, writes:

> The *principal* importance of . . . the First Amendment . . . is its clear demarcation of the legitimate jurisdictions of federal and state governments on religious matters. . . . The Bill of Rights embodied a principle of federalism; it was *essentially* a states' rights document. . . . '[T]he *principal* importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of State and nation regarding religion, rather than in its bearing on the question of the Separation of Church and State.'. . . [T]he First Amendment, was *primarily* jurisdictional (or structural) in nature. . . [and] offered *little* in the way of a substantive right or universal principle of religious liberty. [22]

Less extreme, Arlin M. Adams and Charles J. Emmerich, whose widely used book, *A Nation Dedicated to Religious Liberty,* is an interpretation of the religion clauses, contend that there were three reasons for the religion clauses, only one of which was that the free exercise of religion was an

inalienable right that needed to be protected from the federal government. The other two reasons were jurisdictional in nature. "[C]ivil authority in religious affairs resided with the states, not the national government," and Congress needed to be prevented from interfering with existing state establishments of religion. This means that the framers/ratifiers of the religion clauses, while agreeing on the need for the clauses, may have done so for entirely different reasons. Adams and Emmerich, however, fail to discuss the relative importance or popularity of these different reasons.[23]

One sign of the extent of the influence of Smith, Bybee, Conkle, and others on contemporary thinking about the religion clauses is the following comment contained in an article published in 2003:

> Recent work on the development of the First Amendment . . . confirms that the traditional goals of legal analysis require serious rethinking. The best evidence indicates that the primary if not exclusive purpose of the First Amendment's religion clauses was procedural rather than substantive, to declare that the states and not the national government were responsible for questions of religion and religious liberty.[24]

An even more recent source says, "The observation that the Religion Clauses were originally jurisdictional is commonplace."[25] Even some scholars not inclined to accept such an interpretation of the establishment clause concede that it has "true salience" and, thus, "cannot be easily ignored."[26]

As a practical matter, what difference does it make whether the religion clauses were originally meant to protect the individual right of religious freedom or the states' right to decide for themselves how to treat religion? The resolution of this issue could have a major impact on the way the Supreme Court decides cases arising on the basis of the religion clauses, especially if Supreme Court justices' interpretation of those clauses is based on their original meaning, which traditionally they have claimed to be the case. Today, moreover, certain justices, most notably Justice Antonin Scalia, continue to affirm their commitment to originalism as an important component of constitutional adjudication and interpretation.[27] If such justices were to adopt and use a jurisdictional or states' right interpretation of the religion clauses, how would that be likely to affect the way they decide religion-clauses cases?

The answer depends on whether a case being decided by the Court involves a federal law or a state law. As a practical matter, a jurisdictional interpretation of the religion clauses would still prevent the *federal* government from doing more or less what it is presently prevented from doing on the basis of the Court's traditional, substantive interpretation of the religion clauses.[28] This is because the Court has essentially said that the religion clauses prohibit the government from passing laws that have a primarily religious purpose or effect, which is almost exactly what the proponents of a

jurisdictional interpretation of the clauses say that the clauses prohibit.[29] The only significant difference between the two interpretations of the clauses *as applied to the federal government* pertains not to the kind of law that the clauses prohibit, but to the reasons for their being prohibited. A substantive interpretation of the religion clauses says that federal laws dealing primarily with religion were originally prohibited in order to protect religious freedom, whereas a jurisdictional interpretation says they were prohibited in order to protect the freedom of states.

If, on the other hand, the cases being decided by the Supreme Court on the basis of the religion clauses involve *state laws* and the Court were to decide that those clauses have only jurisdictional meaning or content, then it would decide those cases in a way that would be significantly, even dramatically, different from the way it has traditionally decided them. It would not strike down state laws dealing with religion no matter what those laws said. A states' right interpretation of the clauses would allow state and local governments to pass any kind of law relating to religion that they wanted to pass. In contrast to the present situation, in which cases are decided on the basis of a substantive understanding of the religion clauses, states would be able to discriminate for or against specific religions, religious beliefs, or practices, or persons/groups because of their religion.

To understand how this could be, one must remember that originally the Bill of Rights applied only to the national government and not the state governments.[30] Thus, the First Amendment begins, "*Congress* shall make no law. . . ." It was not until the twentieth century that the Supreme Court began to apply certain provisions of the Bill of Rights to the states. The Court did this on the basis of the due process clause of the Fourteenth Amendment ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."),[31] which was added to the Constitution in 1868. Decades later, the Court decided that that clause had been added to prevent the states from violating certain substantive rights, including, but not limited to, some of those contained in the Bill of Rights, such as religious freedom. The rights in the Bill of Rights that the Court held were protected from state laws by the due process clause were said to be "incorporated" into that clause.[32] Thus, in 1940, it incorporated the free exercise clause into the clause and thereby applied it to the states, and in 1947 it did the same with the establishment clause.[33] Since then, the Supreme Court has struck down numerous state laws on the grounds that they violated the free exercise or establishment clause, as incorporated into the due process clause of the Fourteenth Amendment.

According to the proponents of a jurisdictional interpretation of the religion clauses, however, the Court's incorporating the religion clauses into the due process clause was a major mistake. If those clauses were originally intended to protect a states' right and not an individual right, then logically

they can not be (and should not have been) incorporated into the due process clause of the Fourteenth Amendment and applied to the *states*. If the clauses do not express substantive principles about the proper relationship between religion and government, there is simply nothing to be incorporated into the due process clause and applied to the states. Moreover, any attempt to interpret the clauses in a substantive way and then apply them to the states would be inconsistent with what Smith (and others) say is the original purpose of the establishment clause—to allow the state governments to decide for themselves what their relationship with religion will be.[34] Thus, Akhil Amar, a professor at Yale Law School, writes, ". . . [T]o apply the [establishment] clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself."[35]

Although the Supreme Court at this time is most unlikely to reverse its decision to incorporate the religion clauses into the due process clause of the Fourteenth Amendment,[36] to the extent that individual justices accept the jurisdictional interpretation of the religion clauses, they should and will be inclined to apply those clauses to state laws more leniently than they would apply them to laws of Congress. As explained by one scholar, "because the Framers intended, and the public originally understood, the Religion Clauses to be a federalist directive, federal courts achieve some of the desirable effects of originalism . . . by deferring to the states on close church-state questions."[37] Moreover, some scholars have recently argued in favor of the Court's doing just that, i.e., applying a relaxed version of the establishment clause to the states.[38]

Whether the religion clauses are substantive or jurisdictional in content matters for one other reason. If they are the latter, they arguably would preclude Congress from passing laws that have as their objective the *protection of religious freedom*—laws like the Religious Freedom Restoration Act of 1993,[39] which gives religious persons and groups a general right to be exempt from obeying valid, secular laws, including those passed by state and local governments.[40] Although the religion clauses, if given a jurisdictional interpretation, might not prevent the federal government from granting religion-based exemptions from its own laws,[41] it is reasonably clear that they would prohibit it from requiring the states to grant such exemptions from their laws.

In summary, if the Supreme Court were to officially endorse a jurisdictional or federalist interpretation of the religion clauses, that could have a profound effect on church-state law and practice, at least at the level of state and local governments, which is the level where most church-state cases have originated.[42] Essentially the states would be completely free to pass whatever laws regarding religion they wanted to pass, except insofar as their own constitutions and courts restrained them. Neither the United States Con-

gress nor the federal courts could intervene to protect religious freedom. Moreover, even if the Court did not officially endorse a jurisdictional interpretation of the religion clauses and did not un-incorporate the religion clauses from the Fourteenth Amendment, to the extent that it sees such an interpretation as having some validity, its decisions are likely to be affected by that interpretation. Finally, a jurisdictional interpretation would arguably preclude Congress from passing laws protecting religious liberty from state laws of one sort or another. For these reasons, the jurisdictional or states' rights interpretation of the religion clauses is not an "academic issue" and deserves careful and thorough scrutiny.[43]

Although the jurisdictional interpretation may be plausible, it can be and has been challenged, primarily on the grounds that it is based mostly, if not entirely, on circumstantial evidence and, thus, speculation.[44] Smith himself comes close to admitting this when he writes that his interpretation "is not based on any newly discovered historical evidence. . . . Rather, the conclusion results from working out the *implications* of historical facts that are already familiar to and widely accepted by scholars. . . . *implications* that I believe are plausible and even compelling once we clear away the misformulated inquiries that have caused us to overlook . . . the obvious."[45] Not surprisingly, therefore, he provides no statement from any early American that explicitly or directly supports the idea that the religion clauses are jurisdictional in nature, and, as shown in the rest of this book, he overlooks a great deal of evidence to the contrary.[46]

What is needed, therefore, to establish whether the religion clauses protect individual rights or states' rights is not assumptions or speculation, but concrete historical evidence about *why* they were sought, adopted, and applied to the new national government and *what they meant* to early Americans. Moreover, which of these two interpretations is correct should be determined by a preponderance of the historical evidence. Even if some evidence could be presented to support a federalist interpretation of the religion clauses, that interpretation should not be accepted if more and/or weightier evidence shows a normative reason for and understanding of the religion clauses, and, of course, vice versa. It also will not do for scholars to state that some framers/ratifiers of the religion clauses had normative reasons and others had federalist reasons for supporting the clauses, but then not attempt to explain how both reasons could be combined and/or what their relative importance was. If no attempt is made to do this, the clauses are left meaningless.[47]

The purpose of this book, therefore, is to present and analyze all the actual evidence pertaining to why the religion clauses were adopted and what they meant after they were adopted. Were they adopted for normative or federalist reasons? Were they understood as guarantees of individual rights or states' rights? My main conclusion is that both religion clauses have

substantive or normative meaning. In order to substantiate that thesis, however, I do not need or attempt to establish precisely what that meaning is and to marshal the evidence needed to support such an interpretation. All that I need and attempt to show is that the proponents, drafters, and ratifiers of the clauses had moral or principled reasons for wanting them added to the Constitution. In presenting and explaining those reasons, however, I necessarily *suggest* what the original, substantive meaning of the religion clauses was.

Ironically, what the historical evidence presented in this book shows is that the kind of laws the religion clauses were intended to prohibit, in order to protect religious freedom, is *very similar to* the kind of laws that a jurisdictional or federalist interpretation of the clauses says they were intended to prohibit, i.e., laws dealing directly with the subject of religion.[48] I say "similar to" and not "the same as" because, as will be seen, most early Americans equated religious freedom with the absence of laws characteristic of traditional establishments of religion,[49] i.e., laws that take a position on, either for or against, certain religious beliefs and practices. Such laws, however, are not the same as laws dealing *in any way* with religion. For example, a federal law striking down a state establishment of religion could be construed as a law dealing directly with religion, but it is obviously not the kind of law that early Americans would have associated with establishments of religion or the denial of religious liberty. Under a jurisdictional or federalist interpretation of the religion clauses, such a law would violate the clauses, whereas under the substantive or normative interpretation shown in this book to have been held by early Americans, such a law would not violate the religion clauses.[50]

Nevertheless, the substantive or normative interpretation of the religion clauses that is presented herein is in one significant way like a jurisdictional or federalist interpretation of those clauses, for it, too, says that the religion clauses were intended to deny "Congress," the federal legislature, jurisdiction over a certain subject matter or the *power* to pass a certain category or class of laws.[51] For this reason, and again ironically (because it is consistent with a jurisdictional or federalist interpretation), the historical evidence also shows that the free exercise and establishment clauses have the same (albeit substantive) meaning. Contrary to what the Supreme Court has said, the evidence shows that the two clauses are redundant or two different ways of saying the same thing—that Congress cannot directly legislate on or take a position on religious issues or questions.[52]

On the other hand, the historical evidence shows that Smith and other scholars in his camp are simply incorrect in arguing that the *reason* for such a prohibition was to protect states' rights or uphold the principle of federalism. Rather, and quite clearly, as will be seen, the main reason was to protect religious freedom, which the majority of early Americans believed is threatened, if not violated, whenever *any government*—local, state, or national—legislates directly on subjects or issues that are essentially or primarily relig-

ious in nature. A secondary reason may have been to preserve national unity by preventing the *federal* government from legislating on a subject that was necessarily divisive in a religiously pluralistic nation.

The historical evidence is presented as follows. Using evidence from the ratification controversy, including the views of both Federalists and Anti-federalists, chapter four explains why many early Americans wanted a religious liberty amendment added to the Constitution. The fifth chapter focuses on what happened at the First Congress, which drafted the Bill of Rights. Chapter six addresses the extent to which early Americans were divided on substantive church-state issues, and the seventh examines how the religion clauses were understood by early Americans at the time of and for several years after their adoption.

Before presenting the historical evidence relating to the issue, however, I first clarify (in the next chapter) the nature of the issue—for two reasons. First, there is confusion over exactly what the difference is between the two competing interpretations of the religion clauses, and the confusion has been caused by the use of misleading nomenclature on the part of some scholars. Steven Smith, for example, refers to the "substantive" versus the "jurisdictional" interpretation of the clauses. In the next chapter, I explain why that terminology is confusing and should be replaced by the words "normative" and "federalist." Secondly, there is considerable disagreement about what a jurisdictional or federalist interpretation would entail. For example, would it prohibit all federal laws directly pertaining to religion (a general disclaimer over religion) or only some laws (a partial disclaimer over religion)? The next chapter, therefore, also explains the different jurisdictional or federalist interpretations of the religion clauses that are possible.

Before presenting the historical evidence, I also summarize, in chapter three, the case made by Stephen Smith and others for a jurisdictional or states' rights interpretation of the religion clauses. This is necessary, I believe, so that the reader will understand what kind of historical evidence would be needed to support the various arguments for such an interpretation and can then look, in the later chapters of the book, to see if such evidence exists. On the other hand, in chapter three, I also criticize the logic of some of the arguments that are used to support a federalist interpretation of the religion clauses. Although this may strike the reader as premature (because it occurs before the presentation of the historical evidence), my criticism in chapter three does not relate to whether the historical evidence supports a federalist interpretation. Rather, it relates to the logical validity of certain assumptions that are made by some of the advocates of such an interpretation—assumptions that, in my opinion, have the effect of "loading the dice" in favor of the federalist interpretation. Before presenting the historical evidence, therefore, I attempt to clear away these false and misleading assumptions so that the evidence can speak for itself.